(2)

No. 00-9285

IN THE
SUPREME COURT OF THE UNITED STATES

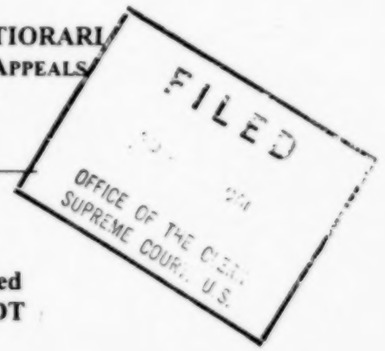
OCTOBER TERM, 2000

WALTER MICKENS, JR.,
Petitioner,

v.

JOHN B. TAYLOR, WARDEN,
SUSSEX I STATE PRISON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT



CAPITAL CASE

Imminent Execution Scheduled
April 17, 2001 at 9:00 p.m. EDT

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Capital Case

QUESTIONS PRESENTED

A Fourth Circuit panel set aside petitioner's murder conviction and death sentence on Sixth Amendment grounds because the state judge who appointed petitioner's defense lawyer failed to inquire into the lawyer's manifest potential conflict of interest – later shown to have amounted to an actual conflict – resulting from his representation of the murder victim on delinquency charges at the very time of the murder. On rehearing *en banc*, a 7-to-3 majority held that such a conflict does not violate the Sixth Amendment.

1. Did the *en banc* Fourth Circuit err in holding – in conceded disagreement with the Second Circuit and at odds with the interpretation of *Wood v. Georgia*, 450 U.S. 261 (1981), by the Eighth Circuit and a number of state high courts – that "even if the trial court failed to inquire into a potential conflict [of interest] about which it reasonably should have known" (2001 WL 133196 at * 5), ***both*** an "actual conflict" ***and*** an "adverse effect" must be shown in order to establish a Sixth Amendment violation?

2. Did the *en banc* Fourth Circuit err in construing the explicit dispositional language of *Wood* – which ordered Sixth Amendment relief to be granted on a finding "that an actual conflict of interest existed" (450 U.S. at 273) when a trial judge had failed to inquire into a manifest potential conflict – as "no more than shorthand for an explicit two-part test" requiring a showing of "adverse effect" ***in addition to*** an actual conflict of interest (2001 WL 133196 at * 10)?

3. Did the *en banc* court err in holding that the "appropriate standard" for "adverse effect" requires not only a showing of (a) a plausible line of defense that conflicted counsel might have pursued and did not, and (b) the feasibility of such an alternative strategy on the facts known to conflicted counsel, ***but also*** (c) "that counsel's failure to pursue that strategy . . . was linked to the actual conflict" (2001 WL 133196 at * 11)?

4. Did the *en banc* court further err in endorsing a notion of this "link" that (a) essentially requires a showing of unreasonable judgments by counsel which would amount to ineffective assistance even in the absence of a conflict of interest (thus confusing the rules of *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and *Strickland v. Washington*, 466 U.S. 668 (1984)) and (b) sustains counsel's judgments on the basis of the record as it was made by the conflicted lawyer himself (thus disregarding the holding of *Holloway v. Arkansas*, 435 U.S. 475 (1978), that such a record is too fallible to rely on because "the evil . . . [of a conflict of interest] is in what the advocate finds himself compelled to *refrain* from doing," *id.* at 490)?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Walter Mickens, Jr., who is scheduled to be executed by the State of Virginia on April 17, 2001 at 9:00 p.m., E.D.T., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming a district court's denial of relief on Mickens' petition for habeas corpus.

OPINIONS BELOW

The opinion supporting the judgement presented for review is that of the Court of Appeals *en banc* reported as *Mickens v. Taylor*, 2001 WL 133196 (4th Cir. (Va.), February 16, 2001), which is reprinted in the accompanying Appendix ("App.") at 1-24. It supplanted a panel opinion granting petitioner relief, *Mickens v. Taylor*, 2000 WL

1292972 (4th Cir. (Va.), September 14, 2000), reprinted at App. 25-46. The opinion of the district court denying habeas relief is reported as *Mickens v. Greene*, 74 F. Supp.2d 586 (E.D. Va. 1999), and reprinted at App. 47-80. An opinion of the Virginia Supreme Court affirming petitioner's conviction and death sentence on direct review is reported as *Mickens v. Commonwealth*, 442 S.E.2d 678 (Va. 1994). This Court granted certiorari and remanded in an order reported as *Mickens v. Virginia*, 513 U.S. 922 (1994), and the Virginia Supreme Court then ordered a new sentencing hearing, *Mickens v. Commonwealth*, 457 S.E.2d 9 (Va. 1995), as required by *Simmons v. South Carolina*, 512 U.S. 154 (1994). Reimposition of the death sentence was affirmed in *Mickens v. Commonwealth*, 478 S.E.2d 302 (Va. 1996), *cert.* denied, 520 U.S. 1269 (1997). A decision of the Supreme Court of Virginia denying a petition for a writ of habeas corpus on December 15, 1997 is unreported. It is set out at App. 81.

JURISDICTION

The Court of Appeals *en banc* issued its opinion on February 16, 2001 and denied Mickens' timely application for rehearing on March 13, 2001. Mickens invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States, which provide in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST., amend. VI.
>
> "No State shall . . . deprive any person of life [or] liberty . . . without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

Petitioner Walter Mickens, Jr. was convicted of the capital murder of Timothy Hall and sentenced to death by a jury in the Circuit Court of the City of Newport News, Virginia in 1993. On the evidence in the present record, the crime was a particularly ugly one. Seventeen-year-old Hall was found stabbed to death, his body bearing 143 "sharp force injuries" of which 25 were fatal. He was lying face down on a mattress beneath an abandoned construction building near the riverside. Under a sheet of plywood, his body was nude from waist to socks, the legs spread apart, with pubic hairs on the buttocks and some white liquid near the anus. (2001 WL 133196 at *1.)

It appeared at trial that five days later, police officers responding to the report of an unrelated assault upon a juvenile arrested Mickens in a parking area beside the construction building. Mickens was questioned about Hall's murder and revealed knowledge that Hall had been killed with a knife. Served with a warrant for the murder and forcible sodomy of Hall, he admitted guilt to the officer who handed him the warrant and later to a cellmate. (2001 WL 133196 at *2.) The Commonwealth presented evidence of these admissions, evidence that after Hall's death, Mickens sold a pair of tennis shoes that Hall was wearing at the time of his death, and evidence that the pubic

hairs found on Hall's buttocks and sperm found on the mattress under Hall's body were consistent with samples taken from Mickens. (2001 WL 133196 at *2 - *3.)

Despite this evidence identifying Mickens as Hall's killer, Mickens took the stand at trial and denied any involvement in the killing. (74 F. Supp.2d at 607.) Mickens was represented at trial by two court-appointed lawyers, Bryan Saunders and Warren Keeling. Saunders was lead counsel (see 74 F. Supp.2d at 599) and assumed responsibility for about ninety per cent of the work. (2001 WL 133196 at *4.) The only evidence presented by defense counsel to support Mickens' denial of involvement was the testimony of his mother that he was home before dark every night during the period when the killing must have occurred (TT. 871 - 898); nothing was adduced to point to any alternative possible perpetrator. (*Id.*; see 74 F. Supp.2d at 610 - 611.) The jury disbelieved Mickens' denial, convicted him of capital murder in conjunction with attempted forcible sodomy, and sentenced him to death. (2001 WL 133196 at *3.) Scant mitigation evidence was presented at the jury sentencing hearing, none of it relating to the circumstances of the offense or to the victim. (Joint Appendix in the Court of Appeals for the Fourth Circuit, pp. 819 - 851.)

Mickens' initial death sentence was set aside after this Court granted *certiorari* and remanded his case to the Virginia Supreme Court[1] to reconsider his claim under

[1] *Mickens v. Virginia*, 513 U.S. 922 (1994) (per curiam), vacating and remanding the judgment entered upon the decision reported as *Mickens v. Commonwealth*, 247 Va. 395, 442 S.E.2d 678 (1994).

Simmons v. South Carolina[2] that the sentencing jury should have been informed about his ineligibility for parole if sentenced to life imprisonment instead of death.[3] At a new sentencing hearing, Mickens was again represented by Saunders and Keeling (74 F. Supp.2d at 592), who again presented little evidence in mitigation (Joint Appendix in the Court of Appeals for the Fourth Circuit, pp. 1129 - 1142.). The jury made both the "vileness" and the "future dangerousness" findings that are predicates for a capital sentence under Virginia law[4] and fixed Mickens' punishment at death. (74 F. Supp.2d at 592.) The trial judge conducting the sentence review prescribed by Virginia law[5] received a post-sentence report including a long paragraph reciting statements by the mother of the seventeen-year-old murder victim that his death had "shattered her world" and that she would "'never be over the way my son was killed.'" (74 F. Supp.2d at 609.) He declined to set aside the jury's sentencing verdict and imposed a sentence of death. (74 F. Supp.2d at 592.) The Virginia Supreme Court affirmed Mickens' death sentence on appeal[6] and later summarily denied his petition for state postconviction relief.

New counsel were appointed to represent Mickens in federal habeas corpus pro-

[2] 512 U.S. 154 (1994).

[3] *Mickens v. Commonwealth*, 249 Va. 423, 457 S.E.2d 9 (1995).

[4] See Va. Code Ann. §§ 19.2-264.2, 264.4(C) (Michie 1995).

[5] See Va. Code Ann. § 19.2-264.5 (Michie 1995).

[6] *Mickens v. Commonwealth*, 252 Va. 315, 478 S.E.2d 302 (1996), *cert.* denied, 520 U.S. 1269 (1997).

ceedings. (74 F. Supp.2d at 592.)[7] While investigating Mickens' background, federal habeas counsel went to the Newport News Juvenile and Domestic Relations Court ("JDRC") to review his file. Counsel asked the duty clerk for Hall's file as well, and the clerk produced it. This file revealed that at the moment of Hall's death, attorney Bryan Saunders – the same Bryan Saunders who later served as Mickens' court-appointed lead trial counsel – had been representing Hall on charges of assault and possession of a concealed weapon that were slated for trial the following week. (2001 WL 133196 at *3.)

Federal habeas counsel requested a copy of Hall's JDRC file. The clerk's supervisor refused, saying that counsel should never have been shown the file in the first place.[8] The supervisor took back the file and refused counsel further access to it. Counsel then obtained a subpoena for the file by reporting what it showed about Saunders' representation of Hall. (74 F. Supp.2d at 600, 602.)

Following additional investigation, counsel filed a federal habeas petition alleging, *inter alia*, that Saunders' representation of Mickens was tainted by a conflict of interest and violated Mickens' Sixth Amendment rights. The district court held a hearing on the claim, at which these facts appeared without dispute (74 F. Supp.2d at 599 & n.8):

On February 21, 1992, Timothy Hall's mother swore out a warrant for Hall's

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[7] Other counsel – neither Saunders and Keeling nor subsequent federal counsel – had represented Mickens in state postconviction proceedings. (2001 WL 133196 at *4.)

[8] Under Va. Code Ann. § 16.1-305 (Michie 1996), JDRC files are confidential and cannot be disclosed without a court order.

arrest, charging him with assault and battery on her. On March 13, 1992, Newport News police charged Hall with an additional offense: possession of a concealed weapon – a serrated bread knife wrapped in paper. On March 20, 1992, Hall appeared before the JDRC, which appointed Bryan Saunders to represent him on both charges and continued the case until April 3. (2001 WL 133196 at *3; 74 F. Supp.2d at 599.)

Sometime between March 20 and March 28, Hall came to Saunders' office. Hall and Saunders conferred for fifteen to thirty minutes. (2001 WL 133196 at *3; 74 F. Supp.2d at 599.) The district court found that this attorney-client interview "was confined to the circumstances surrounding each of the charged crimes" (74 F. Supp.2d at 599) but it also found that:

> "Through his representation of Hall, Saunders learned that: (a) Hall had been charged with carrying a concealed weapon at the intersection of 27th Street and Marshall in Newport News; (b) Hall's mother had pressed charges against him for assault, but she was not interested in prosecuting the case . . . ; and (c) Hall was not living with his mother at the time of his death." (74 F. Supp.2d at 606.)

March 28 was the last date on which Hall was seen alive. He was found dead on March 30. (74 F. Supp.2d at 599.) On April 3, Judge Foster of the JDRC dismissed the charges against Hall, noting by hand on Hall's record sheet (which showed that Saunders was Hall's appointed counsel at the time) that defendant Hall was deceased. (74 F. Supp.2d at 599, 613 - 614.) That same day, Saunders appeared at the JDRC for a hearing on the charges against Hall and was informed that Hall was dead and the charges dismissed. (74 F. Supp.2d at 599 - 606) On April 4, Mickens was arrested; on April 6,

Judge Foster appointed Saunders to represent Mickens in the killing of Hall. (74 F. Supp.2d at 606.) "Judge Foster did not inquire into whether Saunders would have a conflict in representing Mickens" (2001 WL 133196 at *4; see 74 F. Supp.2d at 613 - 614), and Saunders accepted the appointment without ever disclosing to anyone else – to Mickens, the criminal trial judge, or Saunders' court-appointed assistant counsel – that Saunders was representing Hall on criminal delinquency charges at the time of Hall's death (74 F. Supp.2d at 600, 606, 612 & n.20).

In the light of these undisputed facts, federal habeas counsel argued to the district court that Judge Foster had appointed Saunders to defend Mickens without inquiry into a potential conflict of interest that was known or should have been known to Judge Foster; that Saunders was afflicted with an actual conflict of interest throughout his representation of Mickens; and that this conflict of interest adversely affected Saunders' performance. Counsel pointed to Saunders' consistent disregard – both before and at Mickens' guilt-phase trial and two sentencing trials – of information and defensive or mitigating strategies that would have cast Saunders' former client, Hall, in a negative light. Though Hall was killed in a waterside location commonly used for homosexual trysts (see Joint Appendix in the Court of Appeals for the Fourth Circuit, pp. 1325 - 1326, 1081-2082) and located at the base of a precipitous embankment which would have made it unlikely that Hall could be brought there involuntarily,[9] and although a consent defense to the

[9] See Trial Exhibits 1-A to 1-D and the Joint Appendix in the Court of Appeals

charge of attempted forcible sodomy could have reduced the only capital murder charge against Mickens to non-capital murder (whether or not a self-defense claim was also raised to the murder charge itself, see 74 F. Supp.2d at 606 - 607), no evidence was presented on Mickens' behalf suggesting Hall's acquiescence in consensual sex with his killer. (See 74 F. Supp.2d at 607.) No investigation was undertaken of leads available to the defense that suggested Hall's involvement with other persons who might have had a motive to kill him, including a trio of creditors Hall had stiffed and a prostitute (who might have been male or female, according to different leads). (See 74 F. Supp.2d at 610 - 611.) The facts that 17-year-old Hall was not living at home and had assaulted his mother in a manner leading her to file charges against him (although she may have decided later for some reason not to press them) were not used in Mickens' defense in any way, even after the trial judge who was reviewing the jury's death verdict received a post-verdict report containing the most affecting statements (*e.g.*, """all I lived for was that boy,""" (74 F. Supp.2d at 609)) on the mother's part.

Saunders was called as a witness at the district court hearing and testified that he

for the Fourth Circuit, pp. 618 - 619 (guilt-phase testimony of Officer David Seals: *e.g.*, "It's a steep incline I went down--there's a drainpipe that runs down one side of the concrete embankment, and I used the drainpipe about halfway down and then you kind of have to walk on the incline, hold onto whatever you can. . . . There's no steps to get down to that location."). Mickens had originally been charged with the murder of Hall in connection with the crime of abduction as well as attempted forcible sodomy. At the preliminary hearing, the examining judge declined to find sufficient evidence of abduction and the prosecution did not thereafter pursue an abduction theory (see 2001 WL 133196 at *4 n.3).

never perceived any potential conflict of interest between his roles as counsel for Mickens and as counsel for Hall. (74 F. Supp.2d at 605 - 606.) The district court credited this testimony (see, *e.g.*, 74 F. Supp.2d at 605 - 606, 612 - 613) saying that "the evidence shows that, regrettably, Saunders never struggled with the ethical issues" involved (74 F. Supp.2d at 605) in representing a capital murder defendant after having represented the murder victim at the time of death, in connection with the victim's alleged recent criminal delinquencies.[10] This "utter insensitivity to the ethical issues raised by the facts" (74 F. Supp.2d at 612) was attributed by the district court twice to Saunders' belief that "his allegiance to Hall '[e]nded when I walked in the courtroom and they told me he was dead and the case was gone'" (74 F. Supp.2d at 605)[11] and once to "Saunders'

[10] The district court acknowledged that "Hall's criminal history might have had some relevance to Mickens' case if Mickens' testimony had not foreclosed any theory of self-defense." (74 F. Supp.2d at 606 n.15.) But it believed that, because Mickens testified at trial that he did not kill Hall, "any confidential information [Saunders may have obtained] from Hall . . . was [not] relevant to Mickens' defense either on the merits or at sentencing." (74 F. Supp.2d at 606.) Of course, at the time Saunders accepted an appointment to represent Mickens, Saunders had no idea what Mickens' "testimony" might be. And even in retrospect, the "testimony" to which the district court refers as making Hall's history irrelevant *was presented at a trial at which Mickens was counseled and represented by an attorney afflicted with a conflict of interest* that foreclosed the use of information unfavorable to Hall and might therefore have led Saunders to permit – or even encourage – Mickens to take the stand and deny guilt without adequate consultation about whether Mickens would be better advised to forgo testifying and develop theories of defense or mitigation involving consensual sodomy, assaultive behavior, sexual mockery, or other forms of discreditable activity by Hall contributing to his death.

[11] See also 74 F. Supp.2d at 606: "Without condoning the inexcusable failure to disclose the previous representation of Hall, the Court finds that, as a factual matter, Saunders *did not believe* that any 'continuing duties to [a] former client[ ] [might] interfere with his consideration of all facts and options for his current client' (emphasis

conclusion that he did not obtain any confidential information from Hall . . . and that '[n]othing I knew or did or had anything to do with Mr. Hall had anything to do with [Mickens'] case'" (74 F. Supp.2d at 606) . The district court characterized the first of these beliefs as "remarkably wrong" (74 F. Supp.2d at 605) and also found it "inconceivable that Saunders obtained no confidential information from Hall" (74 F. Supp.2d at 606) but ended by concluding that whatever confidential information Saunders may have learned from Hall was not "relevant to Mickens' defense either on the merits or at sentencing" (74 F. Supp.2d at 605).[12] The district court conceded that "[w]hen Saunders was appointed to represent Mickens in the capital murder of Hall, Saunders was obligated to consider the ethical problems posed by the appointment because Saunders' duty to zealously represent Mickens might be compromised by his loyalty to Hall, including his obligation to preserve Hall's secrets and confidences" (74 F. Supp.2d at 605); the district court found as a fact that Saunders had never considered these ethical problems (74 F. Supp.2d at 605) or disclosed the fact of his prior representation of Hall to Mickens or the trial court or even Saunders' co-counsel so that *they* could consider the problems (74 F. Supp.2d at 600, 606, 612 & n.20); but the district court nevertheless concluded that Saunders' dual role in relation to Hall and Mickens neither constituted an "actual conflict of interest" (74 F. Supp.2d at 604 - 606)

added).

[12] See note 10 *supra*.

nor had an "adverse effect" on his representation of Mickens (74 F. Supp.2d at 606 - 613). These conclusions were based upon an analysis that accepted as *given* the record made by Saunders at Mickens' trial, including Mickens' testimonial disavowal of any connection with Hall's death. Such a disavowal, the district judge believed, made irrelevant the ethical constraints that restricted Saunders' ability to develop and present evidence disparaging to Hall.[13] Mickens' federal habeas petition was accordingly denied.

A divided three-judge panel of the Fourth Circuit reversed this decision on the grounds that Mickens

> "has shown that (1) the state judge failed to inquire into an apparent conflict that she knew or reasonably should have known existed, (2) he did not waive any conflict, and (3) his lawyer, Saunders, had an actual conflict of interest. This is sufficient under Wood v. Georgia [450 U.S. 261 (1981)] to establish the merits of his claim that he was deprived of his Sixth Amendment right to representation that is free of conflicts of interest."

(2000 WL 1292972 at *13.) A dissenting opinion argued that, while "the decision in Wood . . . has not turned out to be a model of clarity," *Wood* is best read as requiring a showing of *both* an actual conflict of interest *and* a resulting adverse effect on counsel's performance; and that Mickens had not shown the requisite adverse effect. (2000 WL 1292972 at *14 - 21.)

The Commonwealth's petition for rehearing *en banc* was granted and the Fourth Circuit essentially adopted the position of the panel dissent in rejecting Mickens' Sixth

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[13] See note 10 *supra*.

Amendment claim by a vote of seven to three. After acknowledging that the claim was properly before the *en banc* court on the merits,[14] the majority made two assumptions which framed its analysis of the Sixth Amendment issues presented. It "accept[ed] for purposes of discussion, without deciding the issue, that Judge Foster, who appointed Saunders to represent Mickens, reasonably should have known that Saunders labored under a potential conflict of interest arising from his previous representation of Hall." (2001 WL 133196 at *7.) And it assumed *arguendo*, again without need to "reach Mickens'] . . . argument [on the point decided in his favor by the panel][15] that he has established an actual conflict of interest." (2001 WL 133196 at *10.)[16]

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[14] The *en banc* court agreed with the panel majority and with the district court that Mickens' failure to raise the claim in state court did not bar federal habeas adjudication on the merits under the doctrines of exhaustion or procedural default because the basis for the claim was first discovered by Mickens' federal habeas counsel and could not have been discovered earlier by lawyers for Mickens other than Saunders himself. (2001 WL 133196 at *6.) This circumstance constituted "cause" (*id.*); and "[o]ur inquiry as to prejudice for purposes of excusing Mickens' [procedural] default . . . incorporates the test for evaluating his underlying conflict of interest claim" (*id.*). Since the conflict claim was not "adjudicated on the merits in State court proceedings," 28 U.S.C. § 2254(d), the Sixth Amendment issues are not subject to the standards of review prescribed by AEDPA's subsections 2254(d)(1) and (2). Thus, the *en banc* court addressed and squarely resolved "the merits of Mickens' conflict of interest claim." (2001 WL 133196 at *6.)

[15] The panel majority's discussion of the issue of actual conflict is found in 2000 WL 1292972 at *7 - *13. The panel dissenter also "accept[ed], for the purposes of argument, the [panel] majority's conclusion that Mickens' attorney labored under an actual conflict of interest." (2000 WL 1292972 at *15.)

[16] See also 2001 WL 133196 at *5: "Because we find that Mickens has failed to show an adverse effect, we . . . deny Mickens' petition without deciding whether Mickens has demonstrated that his attorney labored under an actual conflict of interest."

In this state of the case, the *en banc* majority saw the large doctrinal issue presented as involving the appropriate interpretation of *Wood v. Georgia* – the mainstay of the panel's decision granting Mickens relief – in the light of the earlier opinion in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), which was quoted and paraphrased three years after *Wood* in *Strickland v. Washington*, 466 U.S. 668 (1984):

> "Mickens notes that the Wood Court remanded to the trial court [which had failed to conduct any inquiry into a potential conflict of interest of counsel apparent on the face of the record] 'to determine whether the conflict of interest that this record strongly suggests actually existed' with an instruction to award a new hearing if 'an actual conflict existed . . . ' but did not expressly require the trial court to identify an adverse effect. . . . Mickens concludes from this remand instruction that the Wood court eliminated the adverse effect requirement [laid down by *Cuyler* – a case in which counsel's potential conflict of interest was *not* apparent on the record –] in cases where the trial court failed to inquire into a conflict of interest about which it reasonably should have known."

(2001 WL 133196 at *9.) The *en banc* court rejected this conclusion; it declared – with three judges dissenting on the point – that "the Wood Court's terse instruction to the trial court on remand cannot bear the constitutional weight Mickens ascribes to it" (2001 WL 133196 at *10); and it held categorically that "[t]he Supreme Court's decision in Wood does not relieve a petitioner [who is "challenging his conviction on conflict of interest grounds"] of [the] . . . burden [imposed by *Cuyler* to "establish that his attorney's conflict of interest adversely affected his performance"], even when the trial court has failed to inquire into a potential conflict about which it reasonably should have been

aware." (2001 WL 133196 at *14.)[17]

Elaborating the adverse-effect requirement, the *en banc* majority "agree[d] with the district court's articulation of a three-part standard for showing an adverse effect." (2001 WL 133196 at *11.) In addition to "identify[ing] a plausible alternative defense strategy that his [conflict-ridden] . . . counsel might have pursued" and showing that "the alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney at the time," a Sixth Amendment claimant must also show that "defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict" (*id.*). The requisite "link" was held missing whenever the district court found as a matter of subjective fact that Saunders' reasons for various failures were "unrelated" to Saunders' conflict of interest[18] or where Saunders' course of action was one that a competent, unconflicted lawyer might have chosen.[19] [20] "Because . . . [it] agree[d] with the district

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[17] See also the majority's statement of its broad holding in 2001 WL 133196 at *5.

[18] See, *e.g.*, 2001 WL 133196 at *13: "The district court . . . concluded that Saunders' failure to investigate into matters identified by Mickens was either harmless or unrelated to Saunders' conflict of interest. . . . In particular, the district court attributed Saunders' failure to inquire into leads as to possible alternative perpetrators of the murder to the weak nature of the leads, rather than to Saunders' conflict of interest. . . ."

[19] See, *e.g.*, 2001 WL 133196 at *12: "Because Saunders was entitled to rely on the information provided by his client, consensual sodomy was not a viable defense strategy at the time Saunders made his decision not to pursue it. See Royal v. Taylor, 188 F.3d 239, 248-49 (4th Cir. 1999) [a case *not* involving any conflict of interest but dealing with what counsel is "entitled to" do in the context of a claim that *un*conflicted counsel was ineffective]; Roach v. Martin, 757 F.2d 1463, 1476-80 (4th Cir. 1985) [a case involving wholly independent claims of conflict of interest and ineffective

court that many of Mickens' assertions of adverse effect were not viable defense strategies[21] and that any viable defense strategies were not linked to his attorney's

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assistance under *Strickland* in which the passages about counsel's being entitled to rely on a client's statements are found solely in the portion of the opinion discussing the *Strickland* claim]." See also *id.*: "Choosing not to vilify the mother of the victim cannot be *the mark of incompetent counsel* by any measure" (emphasis added).

[20] We use the disjunctive "or" because it is plain that the *en banc* majority held the requisite "link" unestablished even when Saunders' failings were below the standard of professionally competent behavior, so long as they were not subjectively motivated by his perception of conflicting obligations to Mickens and Hall. For example, as quoted in note 18 *supra*, the *en banc* majority approved the district court's conclusions "that Saunders' failure to investigate into [various] matters identified by Mickens was either harmless or unrelated to Saunders' conflict of interest." In connection with one of those investigative failures, the district court wrote: "The lead should have been pursued because . . . [it] suggested that there might have been evidence of an alternative perpetrator. The record discloses no reason for the failure to follow that lead *other than Saunders' lack of perspicacity or perhaps indolence*. Neither of these reasons bespeaks that he failed to act because of his previous representation of Hall." (74 F. Supp.2d at 610.)

[21] Like the district court (see note 10 *supra*), the *en banc* Court of Appeals majority evaluated the "viability" of alternative strategies against the record *as it was made by conflicted counsel himself* and without regard to what sort of record might have been made by conflict-free counsel for Mickens. See, *e.g.*, 2001 WL 133196 at *12: "[P]resentation of . . . evidence [obtained by following up rumors that Hall was a male prostitute] would have been counter-productive and would have been inconsistent with Mickens' assertions of sympathy for the victim and his family. Mickens v. Greene, 74 F.Supp.2d at 608." The cited passage from the district court opinion (at 608) reads: "Of course, adoption of that alternative strategy [of investigating negative information about Hall] would have been inconsistent with Mickens' profession of innocence and his purported regret at Hall's passing. 'I'll pray each and every day that [Hall] may rest in peace.' (6/4/93 Hr. T. at 1090 (sentencing hearing)). Saunders carried that standard during his closing argument, emphasizing the sanctity of human life and expressing regret for Hall's death. (2/7/96 Hr. T. at 479-80; 1/13/99 Hr. T. at 157.) Saunders eschewed an attack on Hall, the young victim of a horrible crime, because it would have appeared disingenuous and would have diminished the value of Mickens' life in the eyes of the jury. (1/13/ Hr. T. at 112, 156-58; 12/23/98 Dep. At 76, 77)."

conflict of interest, . . . [the *en banc* majority] reject[ed] Mickens' Sixth Amendment challenge to his conviction based on the theory that the claimed conflict had an adverse effect on the representation of his attorney" (2001 WL 133196 at *13) and denied habeas corpus relief.

The Fourth Circuit's *en banc* decision was handed down on February 16, 2001. On February 20, the Commonwealth asked the trial court to set an execution date for Mickens, and on March 2 that court set the date for April 17 at the Commonwealth's request despite Mickens' representation that he wanted and intended to seek this Court's review of the divided Fourth Circuit decision by *certiorari*. On March 13, the Fourth Circuit denied rehearing and on March 28 it denied a stay of mandate and a stay of execution to permit this Court to consider a petition for *certiorari* without the pressure of an April 17 deadline. The *en banc* vote on the stay applications was again 7 to 3, and the dissenting judges filed an opinion observing that "in at least one other circuit Mickens would be granted habeas relief" and "he should not be put to death before he has a fair opportunity to seek Supreme Court review."[22]

REASONS FOR GRANTING THE WRIT

This case involves a set of closely connected issues concerning the appropriate

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[22] Opinion of Judge Michael, joined by Judges Motz and King, dissenting from the order of the *en banc* court denying stays in *Mickens v. Taylor*, 2001 WL 300140(4th Cir. (Va.), March 26, 2001 [*en banc*]).

Sixth Amendment analysis when a judge appointing counsel for a criminal defendant chooses a lawyer having an apparent conflict of interest and fails to inquire into the potential conflict. At least two of the issues are the subject of strong disagreement among the federal circuit courts of appeals and state courts of last resort concerning the rules to be derived from the interplay of *Holloway v. Arkansas*, 435 U.S. 475 (1978), *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and *Wood v. Georgia*, 450 U.S. 261 (1981), in light of the description of their teachings in *Strickland v. Washington*, 466 U.S. 668 (1984).

The approach taken to these issues by a 7-to-3 majority of the Fourth Circuit sitting *en banc* below begins by aligning the Fourth and Tenth Circuits against the Second and Eighth Circuits and against several state Supreme Courts. As the Fourth Circuit majority's analysis proceeds further, it departs from the rules adopted by several other circuits to implement the teachings of *Cuyler* and *Wood*, and it ends by making a hash of this Court's precedents: reading the *Wood* opinion in admitted derogation of its explicit language; ignoring the first principles of *Holloway*; and conflating the doctrines that govern Sixth Amendment adjudication in conflict-of-interest cases on the one hand and in non-conflict, ineffective-assistance-of-counsel cases on the other – two discrete bodies of rules that this Court expressly distinguished in both *Cuyler* and *Strickland*.

The opinions below and the way this record squarely poses the issues for resolution make Mickens' case an ideal vehicle for the Court's use in clarifying a vexed area

of Sixth Amendment law while rectifying a grave Sixth Amendment violation.

ISSUE 1:

The Fourth Circuit's Demand that Both an Actual Conflict of Interest and an Adverse Effect Be Shown to Establish a Sixth Amendment Violation When a Court Appointing Criminal Defense Counsel Ignores a Patent Potential Conflict

The first issue, which divided the *en banc* court below, is what a Sixth Amendment claimant needs to show in order to obtain a new trial if and after s/he has once established, within *Wood v. Georgia*, that "the trial court . . . failed to inquire into a potential conflict [of interest] about which it reasonably should have been aware" (2001 WL 133196 at *14). The Fourth Circuit majority assumes that Mickens has shown not only a violation of *Wood*'s requirement of inquiry "into a potential conflict about which [the judge appointing counsel] . . . reasonably should have known" (2001 WL 133196 at * 5) but also that Mickens' attorney "labored under an actual conflict of interest" (*id.*) It nevertheless holds that he is not entitled to a new trial unless he *further* "establish[es] an adverse effect arising from his attorney's conflict of interest." (2001 WL 133196 at *14; see also *id.* at *5, * - *10.)

This holding sets the Fourth Circuit flatly at odds with the Second Circuit,[23]

[23] See, *e.g.*, *Ciak v. United States*, 59 F.3d 296 (2d Cir. 1995); *United States v. Malpiedi*, 62 F.3d 465 (2d Cir.1995); *United States v. Rogers*, 209 F.3d 139 (2d Cir. 2000). The Second Circuit rule is described as follows in *United States v. Stantini*, 85 F.3d 9, 13 (2d Cir. 1996) (dictum):

> "The trial court has an obligation to inquire into the facts and circumstances of an attorney's interests either in response to a timely conflict of interest objection, Holloway v. Arkansas, 435 U.S. 475, 488 . . . (1978), or 'when it knows or reasonably should know of the possibility of a conflict of interest.' Strouse v. Leonardo, 928 F.2d 548, 555 (2d Cir.1991); see also Levy [United States v. Levy, 25 F.3d 146 (2d Cir.1994)], . . . at 153. Failure to engage in such an inquiry, when it is required, results in an automatic reversal. Wood v. Georgia, 450 U.S. 261, 272 n. 18 . . . (1981); Levy, 25 F.3d at 153-54."

Accord: *Sutton v. Strack*, 2001 WL 114316 (S.D.N.Y. 2001) at *1 - *2 and cases cited. In *Ciak*, which is the leading Second Circuit case applying this rule to order a new trial, the Court of Appeals held that no showing of adverse effect was necessary where the trial judge had "neglected to conduct an inquiry when . . . 'sufficiently apprised of . . . the possibility of a conflict of interest,'" (59 F.3d at 304) and the trial record itself established both "actual and potential conflicts of interest" (59 F.3d at 307). In *Malpiedi*, the conflict issue was brought to the court's attention but not adequately resolved at trial; it was raised on a motion for new trial and aired in an evidentiary hearing on the motion; the district court denied a new trial, finding that while there may have been a conflict of interest, the defendant's representation was "not adversely affected by the conflict" because counsel's performance was effective and was motivated solely by appropriate strategic considerations (62 F.3d at 469); the Court of Appeals reversed and ordered a new trial on the ground that the trial record and post-trial hearing evidence disclosed "an actual conflict of interest" (62 F.3d at 469) and, under those circumstances, no showing of adverse effect was required. In *Rogers*, the trial court failed to make appropriate inquiry despite "awareness of a possible conflict" (209 F.3d at 144) and the Court of Appeals reversed for a new trial, rejecting the Government's argument that this result was not required because "the district court did in fact evaluate the conflict – in response to one of Rogers's post-trial *pro se* motions – and found that Rogers suffered no adverse effect" (209 F.3d at 146):

> "If the district court had fulfilled its initial obligation, yet made an inadequate inquiry or obtained a defective waiver, reversal would be appropriate only upon a showing of prejudice or adverse effect. *See* United States v. Lussier, 71 F.3d 456, 463 (2d Cir.1995) (citing [United States v.] Levy, 25 F.3d [146,] . . . 152 (1994)). Absent the required initial inquiry, however, we have no occasion to consider whether there was an adverse effect; indeed, once it is established that a conflict was seen to be possible

the Eighth Circuit,[24] the Supreme Court of Iowa,[25] the Supreme Court of Kansas,[26] the

> and was ignored, we have no occasion to consider whether there was a conflict in fact." (*Id.*)

[24] See *Atley v. Ault*, 191 F.3d 865, 870 (8th Cir. 1999):

> "[T]he Holloway Court held that when a trial court fails to discharge its constitutional duty to determine whether the defendant is receiving assistance of counsel unburdened by a conflict of interest, prejudice is presumed and reversal of the conviction is automatic. *See* id. at 489, 98 S.Ct. at 1181; *see also* Wood, 450 U.S. at 272 n. 18, 101 S.Ct. at 1104 n. 18 (noting that Cuyler 'mandates a reversal when the trial court has failed to make an inquiry even though it "knows or reasonably should know that a particular conflict exists"') (quoting Cuyler, 446 U.S. at 347 . . .)."

In *Atley*, defense counsel and the defendant both requested that counsel be discharged because of a conflict of interest, and the prosecution supported their requests. The Eighth Circuit might have treated these circumstances as bringing *Holloway* into play without regard to *Wood* but it did not. Instead of viewing the requests as objections under *Holloway*, it viewed them as communicating to the trial judge information that alerted him to the existence of a potential conflict, thus bringing *Holloway* into play through the mediation of *Wood*. See. *e.g.*, 191 F.3d at 871 ("As the Iowa Supreme Court recognized, the representations of Weinberg and the prosecutor alerted the trial judge to the 'actual or serious potential for conflict that might occur during the trial' and 'necessitated an inquiry by the court to assess its gravity.' Atley, 564 N.W.2d at 829; *see also* id. at 828 (noting that it was applying Supreme Court authorities that require an inquiry because the trial court was fully advised of the existence of a potential conflict of interest). Under Holloway, the trial court was then constitutionally obligated to either substitute new counsel or take adequate steps to ascertain the seriousness of the risk presented by the conflict."); 191 F.3d at 874 ("As stated above, Holloway requires reversal where the trial court failed to discharge its duty to inquire into a known potential conflict because prejudice to the accused is presumed. Holloway, 435 U.S. at 487-89 . . . .").

[25] *State v. Watson*, 620 N.W.2d 233, 237 - 238 (Iowa 2000):

> "Our review of the cases leads us to agree with those courts holding that

Supreme Court of Ohio,[27] and the Supreme Court of Washington,[28] regarding the

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where the trial court knew or should have known of a particular conflict, reversal is required without a showing that the conflict adversely affected counsel's performance, even though no objection was made at trial. This conclusion is consistent with the Supreme Court's interpretation of Cuyler in Wood, where it said that Cuyler "mandates a *reversal* when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.'" Wood, 450 U.S. at 273 n. 18 . . . (emphasis added). Logic also supports this result. If the trial court knows that a particular conflict exists and fails to conduct an inquiry, it should not matter what the source of the court's knowledge is. Regardless of how the trial court becomes aware of the conflict, the defendant has been denied his right to independent counsel. It is only in cases of uncertainty, where the record shows the mere *possibility* of a conflict, that the additional requirement of an adverse effect on counsel's performance is required to establish an *actual* conflict."

[26] *State v. Jenkins*, 257 Kan. 1074, 1083-1084, 898 P.2d 1121, 1129 (1995) (alternative ground):

"[W]hen a possible conflict exists, but the trial court is not advised of the possibility, the limited presumption set forth in Cuyler applies, and the defendant, in order to establish a violation of his Sixth Amendment right to the effective assistance of counsel, must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. See Cuyler, 446 U.S. at 348 . . . . On the other hand, we hold that where the trial court is advised of the possibility of a conflict by either the defendant or the State, the court is required to initiate an inquiry to insure that the defendant's Sixth Amendment right to counsel is not violated. In this instance, a showing that there is an actual conflict of interest will result in automatic reversal. See Holloway, 435 U.S. at 489 . . . . Prejudice to the defendant is presumed, and reversal of the defendant's conviction is automatic."

[27] *State v. Gillard*, 64 Ohio St.3d 304, 311-312, 595 N.E.2d 878, 883 (1992):

"A review of Holloway, Sullivan and Wood, supra, clearly demonstrates that where a trial court knows or reasonably should know of an attorney's possible conflict of interest in the representation of a person charged with a crime, the trial court has an affirmative duty to inquire whether a conflict of interest actually exists. The duty to inquire arises not

consequences of a *Wood* violation. These courts hold that:

"If an actual conflict existed and the trial court knew or should have known of the conflict, yet failed to make inquiry, reversal is required. *See* Wood, 450 U.S. at 273 n. 18 . . . . If the record on appeal shows only the possibility of a conflict, then the case must be remanded for a determination as to whether an actual conflict existed and/or whether the defendant made a valid waiver of his right to independent counsel. [footnote omitted] *See* id. at 273-74 . . . . If, on remand, an actual conflict is found, prejudice is presumed and reversal is mandated. *See id.*; Holloway, 435 U.S. at 488 . . . . If there is no indication that the trial court knew or should have known of an actual conflict, and defendant made no objection to his representation, then the defendant, in order to obtain a reversal on appeal, must prove that his counsel rendered ineffective assistance by proving that an actual conflict adversely affected counsel's performance. *See* Cuyler, 446 U.S. at 348."[29]

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only from the general principles of fundamental fairness, but from the principle that where there is a right to counsel, there is a correlative right to representation free from conflicts of interest. See, generally, Wood, supra. Where a trial court breaches its affirmative duty to inquire, a criminal defendant's rights to counsel and to a fair trial are impermissibly imperiled and prejudice or 'adverse effect' will be presumed. See, *e.g., Holloway,* Sullivan and Wood, supra."

[28] *In the Matter of the Personal Restraint of Richardson*, 100 Wash.2d 669, 677, 675 P.2d 209, 214 (1983): "Taken together, *Holloway, Sullivan,* and *Wood* create two rules. First, a trial court commits reversible error if it knows or reasonably should know of a particular conflict into which it fails to inquire. Second, reversal is always necessary where a defendant shows an actual conflict of interest adversely affecting his lawyer's performance."

[29] *Watson*, 620 N.W.2d at 238. The Nebraska Supreme Court and the Court of Appeal of California, Fifth District, have applied the same rule, both seeming to derive it from *Cuyler* and *Wood*. See *State v. Hudson*, 208 Neb. 649, 656 - 657, 305 N.W.2d 359, 363 (1981); *People v. Elston*, 130 Cal. App.3d 721, 729 - 730, 734, 182 Cal. Rptr. 30, 35, 37 - 38 (1982).

This is probably also the rule of the Seventh Circuit,[30] and it has been described as a prevalent Sixth Amendment doctrine by other federal and state courts which reviewed the authorities but found no need to take a definitive position on the issue.[31]

On the other hand, the *en banc* Fourth Circuit's reading of *Wood* is in accord with the Tenth Circuit's,[32] possibly with the Eleventh Circuit's,[33] and partly (but only partly)

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[30] The Seventh Circuit cases use two different formulations in stating what needs to be shown to obtain a new trial on conflict-of-interest grounds. Under one formulation, "if the defendant or her attorney alerted the trial judge to a possible conflict of interest or the judge otherwise knew or reasonably should have known that such a possibility existed, we will presume that the defendant was prejudiced if the judge failed to conduct an inquiry into the matter. . . . However, if the trial judge was not put on notice of a potential conflict, we will find prejudice only if the defendant demonstrates that her counsel actively represented conflicting interests and that the conflict adversely affected the counsel's performance." *Cabello v. United States*,188 F.3d 871, 875 (7th Cir. 1999). See also *Lipson v. United States*, 233 F.3d 942, 945 (7th Cir. 2000); *United States v. Pergler*, 233 F.3d 1005, 1010 (7th Cir. 2000); *Holleman v. Duckworth*, 155 F.3d 906, 911 (7th Cir. 1998). Under the other formulation, when a trial court has "failed to conduct a hearing and determine the impact of the conflict of interest . . . we will presume that the conflict prejudiced . . . [the defendant] if he has shown a possibility of prejudice." *United States v. Shorter*, 54 F.3d 1248, 1253 (7th Cir.1995). See also *United States v. Horton*, 845 F.2d 1414, 1418 (7th Cir. 1988); *United States v. Fish*, 34 F.3d 488, 492 (7th Cir. 1994). The application of the "possibility of prejudice" standard in *Shorter*, *Horton*, and *Fish* seems to demonstrate clearly that it is lower than the "adverse effect" standard used in *Cuyler* cases (where the trial judge was not on notice to inquire into a conflict), but because the opinions do not say so explicitly, we cannot be completely confident about the Seventh Circuit rule.

[31] See, *e.g.*, *Garcia v. Bunnell*, 33 F.3d 1193, 1198 - 1200 (9th Cir. 1994); *Lettley v. State*, 358 Md. 26, 38 - 39, 746 A.2d 392, 399 (2000); *State v. Crespo*, 246 Conn. 665, 686, 694, 695 n.27, 718 A.2d 925, 937, 941& n.27 (1998).

[32] See *United States v. Winkle*, 722 F.2d 605, 611 - 612 (10th Cir. 1983). The *Winkle* court's discussion of the issue is so terse that it is difficult to determine what argument it was rejecting when it wrote that "we cannot agree that reversal and a new trial are now mandated in the circumstances of this case" (722 F.2d at 611). But plainly

in accord with the First Circuit's.[34] Such a disarray among the courts of appeals, and

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the court rejected *some* argument against the disposition that it ended up by making of the appeal; and plainly that disposition called for a "hearing to determine whether the conflict of interests, which the record strongly suggests, actually existed and adversely affected defense counsel's performance at the time of trial" (722 F.2d at 611 - 612).

[33] See *Freund v. Butterworth*, 165 F.3d 839 (11th Cir. 1999) (*en banc*). On the facts, it appears that the trial judge in *Freund* failed to make an adequate inquiry into defense counsels' potential conflicts of interest of which the judge was advised. And the Eleventh Circuit's ultimate disposition of Freund's conflict-of-interest claim is to reject it on the grounds that he has shown neither an actual conflict nor an adverse effect on counsels' performance – both showings being treated as required elements of a Sixth Amendment case for a new trial. However, the *Freund* opinion nowhere indicates that Freund made any argument that either of these two showings is *not* required in order to obtain a new trial in a case where the *Wood* duty to inquire into a manifest potential conflict of interest has been disregarded; and we have not found any Eleventh Circuit opinion addressing such an argument. (The one reference to *Wood* in *Freund* appears in the dissent, is indirect, and has to do with a completely unrelated subject. See 165 F.3d at 871 n.2.)

[34] The *en banc* opinion below cites *Brien v. United States*, 695 F.2d 10, 15 n.10 (1st Cir. 1982), as "read[ing] Wood as we do" 2001 WL 133196 at *9 n.6. This is only partly accurate. *Brien* certainly holds that a defendant is not entitled to a new trial by a showing, without more, that his or her trial judge failed to make the requisite *Wood* inquiry into a potential conflict of which the judge was apprised. But the *more* which *Brien* says must be shown to obtain a new trial is only that the defendant's counsel suffered from an "actual conflict of interest," and not that such a conflict had an adverse effect on his or her performance. See 695 F.2d at 15 n.10 ("*Wood* . . . did not require an automatic reversal of the conviction but merely remanded the case to enable the trial court to conduct the necessary inquiry, the implication being that the convictions would only be overturned if an actual conflict were found. Here the section 2255 hearing can serve the same function that the remand served in *Wood*, enabling our review to focus upon the question of whether there was an actual as opposed merely to a hypothetical and unreal conflict."). And in determining whether an actual conflict existed, *Brien* explicitly rejects the approach – which is at the core of the *en banc* Fourth Circuit decision in Mickens' case (see Issues 3 and 4 *infra*, dealing with the Fourth Circuit's "link" analysis) – of inquiring whether counsel's course of action at trial was *motivated* by the conflict of interest. 695 F.2d at 16 n.11 ("The district court found that [defense counsel] Cardinale's decision not to call [a witness,] Abrahams[,] could be supported by reasonable strategic

between some courts of appeals and state supreme courts, on a clear-cut Sixth Amendment issue of broad general applicability, strongly calls for this Court's exercise of its *certiorari* jurisdiction to resolve the imbroglio.

That is particularly true since enactment of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132. Insofar as it amends 28 U.S.C. § 2254(d) to restrict federal habeas review of state-court rulings of federal constitutional law to the question whether a state court decision "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," AEDPA greatly reduces the capability of federal habeas proceedings to promote a uniform construction of the federal constitutional rules governing basic criminal-procedure issues in both state and federal courts.[35] This concomitantly increases the importance of *certiorari* review in cases where "a United States court of appeals has . . . decided an important federal question in a way that conflicts with a decision by a state court of last resort" (Supreme Court Rule 10(a)) dealing with a constitutional issue common to criminal proceedings in both sets of courts. Of course, the same deference

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reasons. We find that irrelevant. [Defendant] Brien does not have to show that the alternatives he suggests would have been used but for the conflict, he merely has to show that they were plausible options foreclosed because of Cardinale's competing interests.").

[35] After AEDPA, the state courts can no longer look to federal habeas decisions for guidance in interpreting the federal constitutional rules applicable to state criminal proceedings, because the task of the state courts in interpreting those rules (to get matters of federal constitutional law *right*) is significantly different than the task of the federal habeas courts (to say only whether state-court constitutional rulings, right or wrong, are objectively *unreasonable*, see *[Terry] Williams v. Taylor*, 529 U.S. 362 (2000)).

provision of AEDPA will ordinarily make federal habeas corpus cases inappropriate vehicles for this Court's important work of resolving state-court/federal-circuit disagreements about such issues. But Walter Mickens' federal habeas case is the exception to this ordinary rule: his Sixth Amendment conflict-of-interest claim is presented for decision – and was decided by the Court of Appeals below – squarely on the merits, with none of the fuzziness attendant to deferential review under AEDPA's § 2254(d), because in his case there was no prior state-court adjudication of the issue to defer *to*.[36]

ISSUE 2:

The Fourth Circuit's Admitted Translation of the Explicit Dispositional Language of *Wood* into "Shorthand" that Means Something Different from its Plain Terms

The *en banc* Fourth Circuit majority thought that Mickens' Sixth Amendment claim stirred a tension among this Court's three leading cases on conflict-of-interest: *Cuyler v. Sullivan*, *Wood v. Georgia*, and *Strickland v. Washington*. The majority purported to resolve that tension by holding that *Wood*, the case most closely on point, does not mean what it says explicitly. Finding that the trial judge in *Wood* – like the judge who appointed Bryan Saunders to represent Walter Mickens – had failed to inquire into a potential conflict of interest which the judge knew or should have known existed, the *Wood* opinion remanded the case with instructions that the trial court "should hold a hearing to determine whether the conflict of interest that this record strongly suggests

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[36] See note 14 *supra*.

actually existed . . . ." 450 U.S. at 273. Specifying both the issue to be heard and the consequences of its resolution, the *Wood* opinion went on to order: "If the court finds that an actual conflict existed . . . and that there was no valid waiver of the right to independent counsel, it must hold a new . . . [trial] that is untainted by a legal representative serving conflicting interests." 450 U.S. at 273 - 274.

The year before, in *Cuyler*, the Court had laid down a two-part inquiry to be undertaken in cases where a potential conflict of interest exists but the trial court neither knows nor has reason to know about it. 446 U.S. at 347. In such cases, a Sixth Amendment violation can be made out only by showing *both* an actual conflict of interest *and* an adverse effect . 446 U.S. at 348, 349 - 350. Describing the rule of *Cuyler* three years after *Wood* in *Strickland v. Washington*, the Court again explicitly articulated the same two-part inquiry, writing that a defendant must demonstrate "that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" 466 U.S. at 692, quoting *Cuyler*, 446 U.S. at 348. In between these two two-part formulations, the Court in *Wood* spoke ***only*** of a determination "that an actual conflict existed" (450 U.S. at 273) when delineating the precise findings that would call for a new trial in one of the "special circumstances" contemplated by *Cuyler* (446 U.S. at 346 - 347), namely, where "the trial court knows or should reasonably know that a particular conflict exists" but fails to inquire into it (446 U.S. at 347). Yet the *en banc* Fourth Circuit glossed *Wood*'s conspicuous one-issue instruction

to the trial court as "amount[ing] to no more than shorthand for an explicit two-part test that the Wood Court did not even have the occasion to quote" from *Cuyler*. 2001 WL 133196 at *10.

With all respect, we suggest that such a free translation of this Court's chosen language in *Wood* should be reviewed by this Court itself. The *Cuyler* and *Wood* opinions, containing noticeably different formulations of the operative test for a new trial, were both written by Justice Powell, a notably careful and precise author. The passage of his *Wood* opinion which the Fourth Circuit parsed as "shorthand" is *the dispositional paragraph*, setting out what the trial court was to do on remand. That is a peculiarly unlikely place for a careful jurist to write inexactly. Moreover, there are two broader reasons why a lower court should not have felt quite so free to disregard Justice Powell's explicit terminology.

First, there was no need to do so in order to harmonize *Cuyler*, *Wood*, and *Strickland* or avoid what the Fourth Circuit majority said would otherwise amount to *Wood*'s having "overruled by implication the second part of . . . [*Cuyler*'s] two-part standard" (2001 WL 133196 at *9). To the contrary, there was no disharmony among *Cuyler*, *Wood* and *Strickland* to begin with, for, as the dissenting judges below pointed out:

> "Holloway, Sullivan, and Wood deal with three separate circumstances in which conflict of interest claims arise under the Sixth Amendment. The first is when a defendant objects to his representation on the basis of a conflict and the trial judge fails to inquire into the merits of the objection. See Holloway, 435 U.S. at 488-89. The second circumstance is when there is no objection to the representation, but the

> judge knew or should have known about an apparent conflict. If the judge fails to inquire in this situation, the defendant is only required to show that his lawyer labored under an actual conflict. See Wood, 450 U.S. at 273-74. The third circumstance is when there is no objection, and the conflict is not apparent to the judge. In that case, the defendant must show that his lawyer labored under an actual conflict and that the conflict adversely affected his lawyer's performance. See Sullivan, 446 U.S. at 348."

(2001 WL 133196 at *17.) And *Strickland* – which of course was not a conflict-of-interest case – said everything it had to say about the subject of conflict of interest in the course of describing the teachings of the *Holloway-Cuyler-Wood* line of cases.

Second, the Fourth Circuit majority's gloss on *Wood* disregards not only the language of *Wood* but the language of *Cuyler* and the logic of that language as well. This point, too, was made by the dissenting judges below. As they noted (2001 WL 133196 at *17), it was *Cuyler*, not *Wood*, that first qualified the *Cuyler* rule by saying that "**[u]nless the trial court knows or reasonably should know that a particular conflict exists**, the court need not initiate an inquiry" into an unchallenged potential conflict of interest (446 U.S. at 347), and the burden thus falls upon the defendant to demonstrate both an actual conflict and an adverse effect in order to establish a Sixth Amendment violation (446 U.S. at 348 - 350). *Cuyler anticipated* the holding in *Wood* and – like *Wood* later – drew a distinction between the rules applicable to Sixth Amendment adjudication of conflict claims in cases where "the trial court knows or reasonably should know that a particular conflict exists" and cases where s/he does not. In light of this distinction, the dissenters below correctly observe that the *en banc* Fourth

Circuit majority's

> "analysis fails as a matter of logic. The majority holds that in every case where there was no objection, the convicted defendant (in order to obtain relief) must show actual conflict and adverse effect, regardless of whether there was an apparent conflict when the case was tried. Under the majority's rule, it makes no difference whether the trial judge had a constitutional duty to inquire because the defendant must always prove the same two conditions. . . . [*Cuyler*], however, dictates that there is a distinction between cases in which the trial judge has a duty to inquire and those in which he does not. As a result, it is simply wrong to hold every defendant to the same burden regardless of whether the trial court was under a duty to investigate an apparent conflict. Wood v. Georgia makes that clear." (2001 WL 133196 at *18.)

Simply put, the *en banc* majority has not only edited *Wood*'s language but made a cipher of its holding and an absurdity of *Cuyler*'s own careful statement – which *Wood* quoted (450 U.S. at272 n.18) – excepting cases in which "the trial court knows or reasonably should know that a particular conflict exists" from *Cuyler*'s no-duty-to-inquire rule and its attendant two-part requirement of showing actual prejudice *and* adverse effect in order to obtain a new trial on Sixth Amendment conflict-of-interest grounds. Mickens' case is squarely within that exception; and a Fourth Circuit ruling which *accepts that he is within it* and yet holds that *Cuyler* requires him "to establish that his attorney's conflict of interest adversely affected his lawyer's performance" and that *Wood* "does not *relieve* him of this burden, even when the trial court has failed to inquire into a potential conflict about which it reasonably should have been aware" (2001 WL 133196 at *14) reduces *Cuyler* as well as *Wood* to an incoherency that this Court should not leave unreviewed.

ISSUE 3:

The Fourth Circuit's Substitution of a Subjective, Motivational "Link" Inquiry for the Unremarkable Requirement of *Cuyler* that a Conflict of Interest Must Affect the Adequacy of Counsel's Representation

The second large issue on which the court below pronounced a decision sharply at odds with the rules that several other circuits have derived from this Court's Sixth Amendment precedents has to do with the "appropriate standard" for an inquiry into "adverse effect" (2001 WL 133196 at * 11). The Fourth Circuit *en banc* majority held that this standard requires not only a finding (1) that there were plausible lines of defense which the conflict-ridden lawyer failed to pursue, and (2) that these lines of defense were feasible as an alternative strategy on the facts known to conflict-ridden counsel, *but also* (3) "that counsel's failure to pursue that strategy . . . was linked to the actual conflict" (*id.*) This aspect of its decision is consistent with the law of the Eleventh Circuit (in cases where *Cuyler v. Sullivan* requires an inquiry into "adverse effect")[37] but appears to be inconsistent with the law of every other circuit (as that law has developed in the *Cuyler* context), insofar as we have been able to determine by research conducted under the time constraints imposed by Mr. Mickens' April 17 execution date.

It is clear and uncontroversial that where *Cuyler* requires a showing of "adverse effect," *some* relationship or "link" must be established between counsel's actual conflict

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[37] *Freund v. Butterworth*, 165 F.3d 839, 860 (11th Cir. 1999) (*en banc*). See note 33 *supra*.

of interest and counsel's performance. This is implicit in the very concept of adverse *effect*. The most widely used touchstone among the circuits for testing this relationship is the inquiry posed in *United States v. Fahey*, 769 F.2d 829, 836 (1st Cir. 1985): whether some plausible defensive strategy not pursued by conflict-ridden counsel "was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests."[38]

The *Fahey* test has been adopted by the First, Second, and Third Circuits.[39] It provides two disjunctive means of showing adverse effect. If a defendant manages to elicit evidence of his or her lawyer's subjective mental processes and shows that the lawyer's choice among alternative potentially viable defensive strategies was "due to" the lawyer's conflicting interests, of course that constitutes an "adverse effect." But in the more usual situations where the lawyer denies having made decisions in this flagrantly unethical fashion, or where the lawyer's motivations are compound or obscure, a defendant can establish "adverse effect" *objectively*, by showing that some viable unused

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[38] The relevant passage from *Fahey*, 769 F.2d at 836, reads:

> "In order to establish an actual conflict the petitioner must show two elements. First, he must demonstrate that some plausible alternative defense strategy or tactic might have been pursued. He need not show that the defense would necessarily have been successful if it had been used, but that it possessed sufficient substance to be a viable alternative. Second, he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests."

[39] *United States v. Soldevila-Lopez*, 17 F.3d 480, 486 (1st Cir. 1994); *Winkler v. Keane*, 7 F.3d 304, 309 (2d Cir. 1993); *Lopez v. Scully*, 58 F.3d 38, 41 (2d Cir. 1995); *United States v. Morelli*, 169 F.3d 798, 810 (3d Cir. 1999); *Hess v. Mazurkiewicz*, 135 F.3d 905, 910 (3d Cir. 1998).

strategy "was inherently in conflict with . . . the attorney's other loyalties or interests."[40] Similarly, under the rules developed by the Seventh, Ninth and Tenth Circuits, an "adverse effect" can be established objectively, through the showing of an inherent conflict between "'a specific and seemingly valid or genuine alternative strategy . . . [and counsel's] duties to others or . . . his own personal interests.'"[41]

The "link" demanded by the Fourth Circuit – not simply a link between counsel's conflict and counsel's *performance* but a link between counsel's conflict and the "failure

[40] *Fahey*, 769 F.2d at 836. *Fahey* added the subjective ("due to") half of its disjunctive formula to the objective ("inherently in conflict") half which it adopted from *Brien v. United States*, 695 F.2d 10, 15 (1st Cir. 1982) ("In order to establish an actual conflict of interest, the petitioner ordinarily must prove two elements. First, he must demonstrate that some plausible alternative defense strategy or tactic might have been pursued. . . . He need not show that the defense would necessarily have been successful if it had been used, but merely that it possessed sufficient substance to be a viable alternative. . . . Second, he must establish that the alternative defense was inherently in conflict with the attorney's other loyalties or interests." Some circuit opinions continue to use the original *Brien* formulation. *E.g.*, *United States v. Bowie*, 892 F.2d 1494, 1500 (10th Cir. 1990) ("'Actual conflict' and 'adverse effect' are not self-defining phrases, . . . but in the context of the instant case, we hold that defense counsel's performance was adversely affected by an actual conflict of interest if a specific and seemingly valid or genuine alternative strategy or tactic was available to defense counsel, but it was inherently in conflict with his duties to others or to his own personal interests.").

[41] *United States v. Migliaccio*, 34 F.3d 1517, 1526 (10th Cir. 1994). See *Church v. Sullivan*, 942 F.2d 1501, 1512 (10th Cir. 1991); *Stoia v. United States*, 22 F.3d 766, 771 (7th Cir. 1994) ("An adverse effect occurs, if, but for the attorney's actual conflict of interest, there is 'a [reasonable] likelihood that counsel's performance somehow would have been different."); *Lipson v. United States*, 233 F.3d 942, 946 (7th Cir. 200); *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992) ("To establish that a conflict of interest adversely affected counsel's performance, the defendant need only show that some effect on counsel's handling of particular aspects of the trial was 'likely'."); *Mannhalt v. Reed*, 847 F.2d 576, 581 - 583 (9th Cir. 1988).

to pursue . . . [an available alternative] strategy" (2001 WL 133196 at*11) – is quite another matter. It focuses on counsel's *motivation*, counsel's *reasons* for taking or forgoing particular lines of defense, and it essentially makes counsel's hindsight testimony decisive of the issue of adverse effect. This is why the *en banc* majority, in approving the district court's conclusion that there was no "link" between any conflict of interest and Saunders' failures to pursue various defensive strategies, treats the district court's fact findings based upon acceptance of Saunders' credibility[42] as centrally important.[43] It is also why the majority dismisses the palpable ways in which Saunders' representation of Hall created interests and loyalties that were intrinsically inconsistent with lines of

[42] See, *e.g.*, 74 F. Supp.2d at 606 ("Without condoning the inexcusable failure to disclose the previous representation of Hall, the Court finds that, as a factual matter, Saunders did not believe that any 'continuing duties to [a] former client[ ] [might] interfere with his consideration of all facts and options for his current client'"); 74 F. Supp.2d at 612 ("When all is said, the Court credits Saunders' testimony that he did not refrain from taking any actions for Mickens because of his earlier representation of Hall."). As we have seen (in note 20 *supra*) the district court credited Saunders' denial of any connection between his representation of Hall and his failures to pursue leads to potential defenses for Mickens that would have tarnished Hall *even when the best alternative explanation that the district court could find for these failings was "no reason . . . other than Saunders' lack of perspicacity or perhaps indolence.*"

[43] "We conclude that the district court's findings are largely factual and are not clearly erroneous. Because we agree with the district court that many of Mickens' assertions of adverse effect were not viable defense strategies and that any viable defense strategies were not linked to his attorney's conflict of interest, we reject Mickens' Sixth Amendment challenge to his conviction based on the theory that the claimed conflict had an adverse effect on the representation of his attorney." 2001 WL 133196 at 13. See also *id.* at * 10 ("Because much of the adverse effect inquiry is heavily fact dependent, we believe appropriate deference should be given to the findings of the district court.").

defensive strategy Saunders might have pursued but did not pursue in Mickens' case.[44]

This Fourth Circuit approach to adjudicating issues of adverse effect is out of line

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[44] The vacated panel decision below found the following inconsistencies particularly significant:

> "Saunders did not investigate (or attempt to develop) any negative information about Hall, the victim of the crime Mickens allegedly committed. Yet the circumstances of this crime (murder and sodomy) suggested that some consideration had to be given to investigating the character and background of the victim. There were no witnesses to Hall's murder, which occurred in a secluded area that was a 'known gathering place for homosexuals,' Mickens, 74 F.Supp.2d at 607. Saunders knew from his representation of Hall that Hall had some tendency to violence or aggressiveness and that for some reason he was no longer living at home, despite his young age. This information, together with the notable location of Hall's murder, at least suggested an investigation into whether consent to the sodomy and self-defense to the murder might be defenses or statutory mitigators. . . . Because of Saunders' duty to protect Hall's secrets and confidences, he could not even *consider* an investigation that was suggested by the circumstances." (2000 WL 1292972 at *11.)

> "Saunders' duty to conduct a reasonable investigation created still another conflicting interest. Because this was a capital case, there was a good chance that someone from the victim's family (perhaps Hall's mother) would testify during the penalty phase. . . . Surely this would require defense counsel to consider investigating the victim's relationship with key family members, especially (in this case) the victim's mother since the victim was a juvenile. Here, Saunders, while he represented Hall, learned something about his relationship with his mother and about the fact that he no longer lived at home. In particular, Saunders learned about the circumstances leading to the charge that Hall had 'grabbed [his mother] by the arms and shoved her to the ground' shortly before his death. Mickens, 74 F.Supp.2d at 599. This confidential or secret information that Saunders had about some aspects of Hall's relationship with his mother also created a conflict: Saunders' interest in preserving Hall's confidences diverged from Mickens' interest in having Saunders consider an investigation into Hall's relationship with his mother." (2000 WL 1292972 at *12.)

with the principles that other circuits have endorsed to govern the adverse-effect inquiry:

> "We give no weight to the post-trial hearing or findings regarding the need for cross-examination on [prosecution witness] Goldfine's first grand jury appearance or [defense counsel] Kelly's thought processes in that regard. First, the applicable standard requires only the demonstration of a conflict inconsistent with a plausible trial strategy or tactic. Cross-examination regarding Goldfine's failure to mention document tampering and her perjury as to [defendant] Delli Bovi's handwriting, even if not mandatory, was certainly a plausible strategy. Second, after-the-fact testimony by a lawyer who was precluded by a conflict of interest from pursuing a strategy or tactic is not helpful. Even the most candid persons may be able to convince themselves that they actually would not have used that strategy or tactic anyway, when the alternative is a confession of ineffective assistance resulting from ethical limitations."

United States v. Malpiedi, 62 F.3d 465, 470 (2d Cir.1995); *accord*: *Perillo v. Johnson*, 205 F.3d 775, 807 (5th Cir. 2000); and see *Brien*, quoted in note 34 above. It is also out of line with the core principles of this Court's conflict-of-interest cases since *Holloway*: – that the Sixth Amendment entitles an accused to counsel who is not beset by conflicting obligations, and that when counsel's loyalties are riven by such a conflict, reconstruction of the reasons s/he forbore to pursue available defense strategies is both impractical and needless. See *Holloway*, 435 U.S. at 489 - 490. Each of these gross misalignments presents a classic case for *certiorari*. See this Court's Rule 10, subdivisions (a) and (c).

ISSUE 4:

The Fourth Circuit's Application of its "Link"Requirement so as to Disregard the Insights of *Holloway* and Conflate the Doctrines of *Cuyler* and *Strickland*

The final step in the *en banc* majority's analysis was to apply its "link" requirement to the facts of Mickens' case, finding that counsel's "strategic decision [regarding one or another possible line of investigation or defense] was unrelated to . . . [his] conflict of interest" (2001 WL 133196 at * 12; see also *id.* at *13), so that "any viable defense strategies were not linked with . . . [the] conflict of interest" (*id.*). This analysis raises two additional issues deserving review on *certiorari* because it marks a radical departure from principles laid down by *Holloway* and *Strickland v. Washington*.

First, by relying on the very record made by conflict-ridden counsel as the source of the essential *facts* to be used in making the "heavily fact dependent" determination whether counsel's strategic judgments were or were not linked with counsel's conflict of interest (2001 WL 133196 at * 10; see also *id.* at *13), the *en banc* majority flouts the holding in *Holloway* that a record made by a conflict-ridden lawyer is – for that precise reason – too unreliable a basis for Sixth Amendment adjudication. *Holloway* teaches that "the evil . . . [of a conflict of interest] is in what the advocate finds himself compelled to *refrain* from doing," 435 U.S. at 490. So, for example, when Saunders concededly failed to investigate leads suggesting the possibility of a consensual-sodomy defense, it misses the whole point of *Holloway* to rely on Mickens' trial testimony denying that he killed Hall as the basis for concluding that Saunders' investigative failings had no adverse effect on the defense. Had the investigation been pursued and produced evidence weakening the prosecution's chances of proving forcible sodomy – the sole basis for its capital

murder case – Saunders might have developed a defense that did not depend on Mickens' testimony and might then have advised and persuaded Mickens not to take the stand at trial. Or Saunders might have avoided a trial completely by using that evidence to overcome the prosecutor's unwillingness to negotiate a non-capital murder disposition, born of confidence that he would have no trouble proving the forcible-sodomy predicate.

> "It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of [the trial and] sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible."

Holloway, 435 U.S. at 490 - 491.

Second, in pursuing the "link" inquiry by asking whether Saunders had a reasonable basis, apart from the conflict itself, for his choice of defense strategies (2001 WL 133196 at * 12 - *13), the *en banc* majority effectively requires the same showing of unreasonable judgment on the part of conflict-ridden counsel that would constitute incompetence on the part of a lawyer *not* saddled with a conflict. (Indeed, in rejecting one of Mickens' arguments about a possible defense strategy that his lawyer failed to pursue, the majority actually says that a choice to forgo this strategy "cannot be the mark of incompetent counsel by any measure." 2001 WL 133196 at * 12.) This analysis makes an utter hash out of *Strickland*'s recognition that conflict-of-interest cases cannot be assimilated into the general rules governing ineffective assistance of counsel because

"counsel . . . burdened by an actual conflict of interest . . . breaches the duty of loyalty, perhaps the most basic of counsel's duties . . . [and] it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." (466 U.S. at 692.)

CONCLUSION

The decision of the Fourth Circuit in this case addresses important Sixth Amendment issues of general applicability and answers them in questionable ways that are difficult to square with this Court's pertinent opinions and impossible to square with the construction of those opinions by various other federal and state courts. With respect to two of the major issues, there is some support for the Fourth Circuit's ruling in the welter of incompatible lower-court caselaw, but the confusion reflected by that welter is all the more reason for this Court to take the issues up. Mickens' case presents an unusually good vehicle for this Court's consideration of the entire set of connected issues because, in order to reject Mickens' conflict-of-interest claim on the compelling facts at bar, the Fourth Circuit *en banc* majority had to decide all of the issues against him *seriatim* in a series of rulings leading to an extreme result. *Certiorari* should be granted.

Respectfully submitted,

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